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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938.

HAROLD F. SNYDER,
Petitioner,
vs.
CITY OF MILWAUKEE,
Respondent.

No. [redacted] 18

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN AND SUPPORTING BRIEF.

A. W. RICHTER and
OSMOND K. FRAENKEL,
Counsel for Petitioner.

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Cases Cited.

Statute and Ordinance.

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PETITION FOR WRIT OF CERTIORARI

to the Supreme Court of the State of Wisconsin.

To the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Harold F. Snyder respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Wisconsin affirming a judgment of the Circuit Court of Milwaukee County, which had found petitioner guilty of distributing handbills in violation of a City ordinance of the City of Milwaukee.

SUMMARY STATEMENT OF MATTERS INVOLVED.

Petitioner, and eighteen other persons, all of whom were at the time pickets of the Amalgamated Meat Cutters and Butcher Workmen of North America, American Federation of Labor, Local 73, a labor union in Milwaukee, were arrested for the violation of the handbill ordinance of the City of Milwaukee (Sec. 865, Art. 16, Milwaukee Code, 1914), in distributing as a part of such picketing the circulars similar to Exhibit 1 (R. 18). Petitioner and the other defendants were tried in the District Court of Milwaukee County, and were discharged upon the ground of the unconstitutionality of the ordinance. Respondent, City, appealed and upon trial de novo in the Circuit Court of Milwaukee County, petitioner moved at the commencement of the trial to dismiss the prosecution upon the ground that the handbill ordinance, Section 865, Milwaukee Code (R. 7), was unconstitutional on its face, because it deprived him, and the other defendants, of their right to freedom of speech and the press, in violation of the due process clause of the Constitution of the United States (Judge's decision, R. 1). The case was submitted upon undisputed testimony, and at the close of the trial the motion to dismiss was renewed upon the foregoing ground, and upon the ground that the manner of enforcement of the ordinance as shown by the evidence also violated petitioner's right under the due process clause, and under the equal protection clause of the Fourteenth Amendment of the Federal Constitution (R. 2).

The trial court filed a written decision setting forth its grounds for sustaining the ordinance (R. 1 et seq.). The Supreme Court of Wisconsin, the highest court in the state, affirmed the judgment upon the grounds set forth in the written opinion (R. 20 et seq.).

City of Milwaukee v. Snyder, January 10, 1939, 283 N. W. 301.

The ordinance (R. ....) prohibits the throwing of slops, dirty water, dead carcasses and other nauseous and unwholesome matter, or any rubbish, paper, etc., upon any streets, sidewalks or other public places in the City of Milwaukee. The ordinance, which is part of the chapter on health of the Milwaukee Code, is headed "Throwing filth, rubbish or nauseous substances on streets." It provides, further, that it is unlawful "to circulate or distribute any circulars, handbills, cards, posters, dodgers or other printed or advertising matter."

Petitioner and his codefendants were prosecuted under the latter clause.

The evidence showed that petitioner and his codefendants distributed the handbills in an orderly manner; that they were very careful not to throw any into the streets, but that some of the persons who accepted the handbills did throw them into the streets, and that there were a number of handbills in the gutters and on the street.

The evidence also showed that the police officers did not arrest any of the persons who accepted the handbills and threw them onto the street, and that this was in accordance with the policy of the police department, which was to arrest the distributors, but not those who threw the printed matter into the streets.

QUESTIONS PRESENTED.

The case presents the question whether an ordinance which prohibits all distribution of handbills, circulars or printed matter of any kind, is valid under the Fourteenth Amendment of the Constitution of the United States.

The case also presents the question whether enforcement of the ordinance solely against persons distributing printed matter, and refusal to enforce it against persons actually littering the streets, is such discrimination as to render the ordinance invalid.

These questions involve the subsidiary question as to whether the interpretation of the ordinance by the Supreme Court of Wisconsin so as to cover only such distribution of printed matter as results in littering of the streets is effective to sustain the ordinance.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

The Supreme Court of the State of Wisconsin, a court of last resort, has decided a federal question in a way in conflict with applicable decisions of this Court.

Lovell v. City of Griffin, 303 U. S. 444, 82 L. Ed. 660, 58 S. C. 666;
Grosjean v. American Press Co., 297 U. S. 233;
Herndon v. Lowry, 301 U. S. 242, 81 L. Ed. 631;
De Jonge v. Oregon, 299 U. S. 353, 81 L. Ed. 189;
Near v. Minnesota, 283 U. S. 691;
Stromberg v. California, 283 U. S. 359.

Other cases involving the same question are before this Court, or will shortly be here, on appeal.

Young v. California (Dec. 9, 1938, not yet officially reported), 85 Pac. (2nd) 231, Docketed as No. 715 in this Court;
Nichols v. Massachusetts (Dec. 2, 1938, not yet officially reported), 18 N. E. (2nd) 166.

The question is of general concern throughout the United States.

The decision of the Supreme Court of Wisconsin is contrary to the decisions of other courts.

People v. Armstrong, 73 Mich. 288;
People v. Johnson, 117 N. Y. Misc. 133;
City of Chicago v. Schultz, 341 Ill. 208;

People ex rel. Gordon v. McDermott, 169 N. Y. Misc. 743;
C. I. O. v. Hague, 25 F. Supp. 127 (affirmed January 26, 1939, now awaiting decision in this Court).

Wherefore, it is respectfully prayed that a writ of certiorari be issued out of, and under the seal of, this Honorable Court directed to the Supreme Court of the State of Wisconsin commanding that Court to certify and send to this Court for its review and determination the full and complete transcript of the record and all proceedings in the case at bar, and that the judgment of the said Supreme Court of the State of Wisconsin may be reversed by this Honorable Court, or the case ordered dismissed, and that your petitioner may have such other and further relief in the premises as this Honorable Court may deem just and proper, and your petitioner will ever pray.

HAROLD F. SNYDER,
Petitioner,

A. W. RICHTER and
OSMOND K. FRAENKEL,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

JURISDICTION.

The jurisdiction of this Court is invoked under Judicial Code, Sec. 237-b, as amended by the Acts of February 13, 1925, and March 8, 1934, 28 U. S. C. 344-b.

The date of the final judgment is January 10, 1939, on which date the Supreme Court of Wisconsin affirmed the conviction of petitioner and his codefendants (R. 23). No application for rehearing was made.

The nature of the case and the rulings below bring the case within the jurisdictional provisions of section 237-b, supra. The claims of federal constitutional right were specifically raised and set up at the commencement of the trial by motion to dismiss (R. 1) and by similar motion at the conclusion of the trial (R. 1). The trial court overruled said motions and denied said claims of federal constitutional right and by its final judgment rendered judgment against said claims (R. 3). The Supreme Court of the State of Wisconsin in its opinion specifically affirmed said denial of petitioner's claimed constitutional rights, and specifically passed adversely upon petitioner's claimed constitutional right, and overruled the same (R. 20 et seq.).

The federal rights claimed by petitioner are that the ordinance is unconstitutional upon its face, as applied to him, in denying him due process of law under the Fourteenth Amendment of the United States Constitution, and denying him the equal protection of the laws under the same amendment of the Constitution of the United States. The first of these claims is based upon the contention that

petitioner's right to freedom of speech and freedom of the press were violated by the prohibition of the distribution of handbills and circulars contained in the said ordinance (Sec. 865, Art. 16, Milwaukee Code 1914; R. 7). The second claim of the denial of federal right is based upon the undisputed fact (R. 2, 17), and the finding of the trial judge, that the City of Milwaukee, through its Police Department, in enforcing the said ordinance, consistently failed to arrest persons who actually littered the streets, and consistently arrested only persons who distributed leaflets or handbills without littering the streets.

The following cases, among others, sustain the jurisdiction of this Court:

Lovell v. Griffin, 303 U. S. 444;
Yick Wo v. Hopkins, 118 U. S. 356.

II:

STATEMENT OF THE CASE.

As appears from the petition, supra, petitioner and his codefendants were convicted under the Milwaukee ordinance for distributing a handbill dealing with a labor controversy (R. 18). It was not contended by the prosecution that petitioner and his codefendants had littered the streets, and the trial judge found that they had not (R. 2). The contention was that some of the persons who had accepted the handbills had thrown them into the streets, and had, to some extent, littered the streets (R. 2). The undisputed evidence also showed that the police officers observed the persons who accepted and threw away the handbills, and caused whatever littering of the streets there was, but failed to arrest them, and that this failure to arrest was in accordance with their orders and the general policy of the City as carried out by its Police Department to arrest only distributors (R. 9, 11, 14).

Originally, petitioner and his codefendants were dis-

charged upon the ground that the ordinance was unconstitutional, but upon appeal by the City of Milwaukee the Circuit Court of Milwaukee County reached a contrary conclusion, which was affirmed by the Supreme Court of the State of Wisconsin.

III.

OPINION BELOW.

The decision of the Supreme Court of Wisconsin is based upon the theory that the ordinance in question is a valid exercise of the police power by the City.

City of Milwaukee v. Snyder, January 10, 1939, not yet officially reported, 283 N. W. 301.

The Court bases this conclusion upon a prior decision,

Milwaukee v. Kassen, 203 Wis. 383 (1931), 234 N. W. 352,

in which it had announced the doctrine, which it reaffirms in the present case, that the ordinance was not intended to prevent distribution unless such distribution results in a littering of the streets, and that, under such interpretation, the ordinance was valid.

The reasoning of the Court is based upon the theory that, if the ordinance is restricted to cover only such distribution as results in a littering of the streets, then it can be sustained as a valid exercise of the police power in that it has relation to the promotion of cleanliness and safety of the municipality.

ERRORS TO BE ASSIGNED.

The Supreme Court of Wisconsin erred:

1. In holding that the ordinance did not violate the Constitution of the United States.

2. In holding that the method of enforcement did not render the ordinance invalid under the Constitution of the United States.

ARGUMENT.

A. Case Ruled by Lovell v. Griffin.

The question is identical with the question which was before this Court in

Lovell v. City of Griffin, 303 U. S. 444.

There is no essential distinction between the ordinances in the two cases which would give the basis for distinction in law. As to the ordinance in that case, this Court said (p. 450):

> "The ordinance in its broad sweep prohibits the distribution of 'circulars, handbooks, advertising, or literature of any kind.'"

That ordinance by its terms prohibited distribution without obtaining a permit from the city manager; the Milwaukee ordinance in question here makes it unlawful to circulate or distribute any circular, handbill or other printed matter. It is clear that the provision of the Milwaukee ordinance is more drastic in the denial of the right of distribuiton than the Griffin ordinance. The Griffin ordinance was not a categorical prohibition, but gave a conditional right of distribution; the Milwaukee ordinance absolutely prohibits any distribution.

Upon the question of the tenability of the ground assigned by the Wisconsin Supreme Court for sustaining the ordinance, that is, that it may be interpreted so as to be sustained as a police power measure, the decision of this Court in the Lovell case is conclusive. This Court there holds

> "that the ordinance is invalid on its face."

Therefore, whether there were any grounds under the police power for the passage of the ordinance or not could not avail to sustain it. If the ordinance is invalid on its

face, then no question as to its applicability to a given necessity in the health, welfare or safety of the City can avail to sustain it. If the Griffin ordinance is invalid on its face, then the Milwaukee ordinance is likewise so invalid, and this regardless of

"whatever the motive which induced its adoption."

The very reasons which are given by the Supreme Court of Wisconsin, that is, that the ordinance is an exercise of the police power adopted by the City to promote cleanliness and health on its streets, was the basis of the only plausibly tenable argument advanced in support of the Griffin ordinance. The brief of counsel for appellee in that case (303 U. S. 444) advances as its principal contention in support of the ordinance the argument that it falls within the permissible field of regulation open to every municipality in facing the sanitary problem of removing from its streets papers, circulars and other like materials. This Court, therefore, considered and ruled upon the very ground urged in support of the ordinance upon which the decision of the Supreme Court of Wisconsin is based. Therefore, the rule of the Wisconsin Supreme Court that the ordinance may be sustained as an exercise of the police power when interpreted as applying only to situations where distribution results in substantial littering of the streets is contrary to the decision of this Court. It is submitted that the decision of the Wisconsin Supreme Court affords no ground of distinction between the Griffin ordinance and the Milwaukee ordinance, and that, under the decision of this Court in the Griffin case, the judgment in the present case should be reversed.

B. Applicability of Police Power.

What has been said above refers to the police powers generally as a possible justification for antidistribution

ordinances, without regard to the particular situation claimed to be met by the Milwaukee ordinance. The first question to be decided in considering the matter of the police power, with reference to such ordinances, would be whether there is any situation sufficiently grave to justify absolute prohibition of all distribution of literature on streets and highways as a police power measure. That question is apparently left open by this Court in the Lovell case (303 U. S. 451).

However, since distribution is a part of freedom of speech and freedom of the press, and, therefore, protected as a fundamental constitutional right under the Constitution of the United States, only the very gravest necessity, if anything, could justify the complete suppression of that part of the liberty of the press consisting in the right of distribution.

> Near v. Minnesota, 283 U. S. 691, 707 et seq.;
> Stromberg v. California, 283 U. S. 359, 368;
> De Jonge v. Oregon, 299 U. S. 353, 364 et seq.

The ordinance presents not a restriction of the right guaranteed by the Constitution proportionate to a necessity existing in the public order and requiring the application of the police power, but a complete deprivation of the right not related to nor commensurate with any such public necessity. It is submitted that a complete prohibition of the exercise of the liberty guaranteed by the Constitution can in no event find defense in the police power, at least not in the absence of gravest necessity for the very preservation of government or the safety of our people.

C. Specific Application of Police Power in Present Ordinance.

The particular evil which the Wisconsin Supreme Court sets out as the excuse for the prohibitory ordinance in

question consists in the unsightly and untidy condition created on the streets by the casting away of the hand bills and circulars distributed. The Court says, quoting from its prior decision in Milwaukee v. Kassen, 203 Wis. 383 (1931), 234 N. W. 352:

> "The object sought to be attained by the ordinance evidently is to prevent an unsightly, untidy and offensive condition of the sidewalks."

Baldly stated, therefore, the basis of the decision of the Supreme Court of Wisconsin is that it is a sufficient ground to take away all right of distribution of any printed matter on the streets of the City merely to prevent unsightly and untidy condition of the streets. Certainly it would seem clear beyond argument that so fundamental a right as the right of free speech and free press, as interpreted by this Court, cannot be abridged materially, let alone entirely abrogated, for so insignificant a reason as tidiness of streets. Certainly it is clear that tidiness of streets does not comprehend within itself such a necessity as requires so drastic an application of the police power as is here involved. That the necessity does not justify the scope of the exercise of the power in this case is evident.

D. Ordinance Adequate to Meet Necessity Without Deprivation of Constitutional Rights.

However, not only is the object to be attained by this ordinance on the theory of the Supreme Court of Wisconsin not adequate to afford a basis under the police power for the deprivation of a fundamental constitutional right, but adequate provision is made in the ordinance to meet the very necessity which the Court assigns as the ground for the validity of the ordinance.

The ordinance provides in its principal part that it is

unlawful to throw or leave certain noxious substances, rubbish, **paper or other substances whatsoever** upon sidewalks, streets, etc. Thus it is forbidden under the ordinance to throw paper upon the streets, and the enforcement of this part of the ordinance would achieve the cleanliness and tidiness which the Court gives as the legitimate object of the ordinance. Enforcement of the ordinance, according to its express terms, would remove all necessity for encroachment on constitutional rights.

However, the testimony showed, and the trial court states (R. 3) that the police officers did not arrest anyone who threw handbills upon the street, and that it was the policy of the police department that only those distributing, and not those actually littering, be arrested, and that this has been the policy of the police department all along. Clearly, no grave problem of health, sanitation or public safety exists, but the City can achieve the cleanliness and tidiness of its streets which the Wisconsin Supreme Court deems of sufficient importance to be the ground for the sacrifice of the fundamental constitutional rights merely by enforcing the unquestionably valid part of the ordinance. It cannot be said that there exists a necessity which is adequate, and that means commensurate with such necessity are prescribed by the ordinance so as to justify the sacrifice of basic constitutional rights when the enforcement of the valid portions of the ordinance would meet the need. The long and consistent practice and the established policy of the City in the enforcement of this ordinance would seem to indicate that the tidiness and neatness of the streets did not seem to be so much the desired end as the prevention of the distribution of the views, beliefs and opinions of persons, was and is the real end of the ordinance.

But the Supreme Court of Wisconsin cannot reach its view of the ordinance even to create this untenable de-

fensibility of it as a police power measure by the ordinary process of interpretation or construction, but must resort to a process of creating additional parts of the legislation. The ordinance provides that it is

> "unlawful for any person to circulate or distribute any circular, handbills, cards, posters, dodger or other printed or advertising matter * * * in or upon any sidewalk, street or alley * * * within the City of Milwaukee."

The Court interprets this plain language to mean that distribution is prohibited when it results in actual littering of the streets, that is, when distribution is in such quantities, or in such manner, or perhaps in such type of circular that substantial quantities, as the Court says, get on the streets. This is far from the language of the ordinance, and it is submitted that it is not what the Court says the ordinance is, but what it actually is, that this Court must decide.

> "Thus the crucial question is not the formal interpretation of the statute by the Supreme Court of Georgia, but the application given it."
>
> Herndon v. Lowry, 301 U. S. 242, 260;
> Near v. Minnesota, 283 U. S. 697, 711.

Furthermore, the construction by the Wisconsin Supreme Court cannot save the ordinance from constitutional invalidity, because it creates such indefiniteness and uncertainty of the offense as to make fair and just enforcement impossible, and therefore renders the legislation unconstitutional for uncertainty.

> Stromberg v. California, 283 U. S. 359, 369;
> U. S. v. L. Cohen Grocery Co., 255 U. S. 81, 87, 41 S. C. 298, 65 L. Ed. 516;
> Herndon v. Lowry, 301 U. S. 242, 261 et seq., 81 L. Ed. 631.

It is submitted that the additions to the ordinance contained in the decisions of the Supreme Court of Wisconsin cannot render it valid.

E. The Decision of the Wisconsin Supreme Court Is at Variance With Lovell v. Griffin and the Decisions of Other Courts.

The Supreme Court of Wisconsin attempts to reconcile the ordinance in question with the decision of this Court in Lovell v. Griffin, but it is submitted that such attempted reconciliation is based upon a misconception and misinterpretation of the decision of this Court in that case.

The Court says, with reference to the opinion of Mr. Chief Justice Hughes, that it negatives the idea that an ordinance aimed to prevent the littering of the streets is within the purview of the decision, and quotes from the decision of this Court, as follows:

> "It (the ordinance) is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involve disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets."

The Court says with reference to this language:

> "The implication plainly is that an ordinance so aimed is not unconstitutional, if reasonable in its terms."

The language above quoted from the opinion of this Court in the Lovell case evidently refers to provisions of an ordinance relating to the acts and conduct of persons distributing circulars, handbills, etc., that is, such an ordinance might validly and without infringing constitutional rights prevent breaches of the peace, disorderly conduct, molestation of inhabitants, littering of streets,

and the like, by distributors of handbills or other printed matter, but no such ordinance or other legislative enactment could constitutionally take away or even limit the constitutional rights of persons desiring to distribute their views and opinions to their fellowmen, because some one else was guilty of disorderly conduct, molestation of inhabitants, littering or the like. Distribution may be limited to prevent disorderly conduct and other acts inimicable to the public peace or welfare by the distributor. Clearly, this is purport of the language of the Chief Justice in the Lovell case. The interpretation of the Milwaukee ordinance by the Wisconsin Supreme Court validates not only the limitation, but the complete prohibition of any distribution because some one other than the distributor litters a street. The Court not only holds, but it has been the settled practice, as the Court said, to punish the distributor when the recipient throws the handbill into the street. Certainly, the language of the Chief Justice in the Lovell case did not mean to include in the field of permissible restriction of distribution limitations based on the acts of other and unrelated persons than the distributor. There is no warrant in the language of the Chief Justice for the conclusion of the Wisconsin Supreme Court that an ordinance which deprives a person of his constitutional rights on account of the acts of others, can be constitutionally valid. It is submitted that the Milwaukee ordinance under the interpretation of the Supreme Court of Wisconsin takes away the constitutional rights of one on account of the acts of another, and is therefore an unjustifiable deprivation of rights guaranteed by the Constitution of the United States.

Respectable authorities elsewhere have reached the same conclusion.

People v. Armstrong, 73 Mich. 288;
People v. Johnson, 117 N. Y. Misc. 133;

City of Chicago v. Schultz, 341 Ill. 208;
People ex rel. Gordon v. McDermott, 169 N. Y. Mis. 743;
C. I. O. v. Hague, 25 F. Supp. 127, affirmed January 26, 1939, now awaiting decision in this court.

It is submitted that these cases are correct on principle, and that the doctrine therein announced is within the rule of Lovell v. Griffin and should be followed in the present case.

F. The Method of Enforcement of the Milwaukee Ordinance Also Rendered It Unconstitutional.

It is undisputed in the case that it has been the policy of the police department, in enforcing this ordinance, not to arrest any persons who throw circulars or handbills on the streets or public places, but to arrest the distributors who hand them out. The evidence also showed that this was the practice followed with reference to petitioner and the other defendants. It has been the consistent policy of the City of Milwaukee to ignore that part of the ordinance which would have effectively prevented littering of the streets, and to enforce the prohibition against distribution, notwithstanding that the distributor did nothing but distribute.

The rule of law with reference to unconstitutional conditions is not logically or rationally limited to discrimination on account of race or color. It is the doctrine of this Court that

> "A valid law may be wrongfully administered by officers of the state so as to make such administration an illegal burden and exaction upon the individual."
>
> C. B. & Q. R. Co. v. City of Chicago, 166 U. S. 226, 233 et seq., 17 Sup. Ct. 581, 41 L. Ed. 979.

Discriminatory administration of otherwise apparently valid laws renders them unconstitutional.

Yick Wo v. Hopkins, 118 U. S. 356;
Crowley v. Christensen, 137 U. S. 86, 91, 11 Sup. Ct. 13, 34 L. Ed. 620;
Raymond v. Chicago Union Traction Co., 207 U. S. 20, 35, 28 Sup. Ct. 7, 52 L. Ed. 78;
Ah Sin v. Wittmann, 198 U. S. 500, 26 Sup. Ct. 367, 49 L. Ed. 1142;
Dobbins v. Los Angeles, 195 U. S. 223, 240, 49 L. Ed. 169.

The City has not only not enforced the law against those who actually littered the streets, but it has never enforced it against general distribution on the public streets of newspapers and periodicals, notwithstanding the express language of the act by which it applies to all printed matter.

There is apparent the discriminatory administration as against the impecunious citizen, the poor minority, which cannot afford to buy space in our expensive newspapers and periodicals to express its views to its fellowmen. The labor union, as in the instant case, does not generally have the money to make use of the high-priced privately owned press of the country to disseminate its views. The poor religious sect, the sincere and self-sacrificing social reformer, the political liberal and others not of financial ability to spend large sums to distribute their opinions, views and beliefs, are denied the only feasible method of using their constitutional right to disseminate their views. Such method of enforcement creates the unconstitutional condition which renders the law invalid.

CONCLUSION.

The question decided in Lovell v. Griffin has not been set at rest by that decision. In all parts of the country

there has been vigorous enforcement of legislative enactments which were assumed to be clearly outlawed by the decision. Cases from the States of Massachusetts and California are now in this court, or will be here in the very near future. In both instances, according to the information received, they involve questions identical, or almost identical, with those involved in the present case. In order that it may be known to the country whether any prohibition of distribution of pamphlets, handbills or circulars is valid under the doctrine of Lovell v. Griffin, and what limitations may be put upon such distribution, it is submitted, certiorari should be granted in this case.

It is, therefore, submitted that the writ of certiorari should be granted as prayed for, and the decision of the Supreme Court of Wisconsin should be reviewed.

Respectfully submitted,

A. W. RICHTER and
OSMOND K. FRAENKEL,
Counsel for Petitioner.